FILED
United States Court of Appeals
Tenth Circuit

September 18, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: DAVID BRIAN MORGAN, Petitioner.	No. 20-6123 (D.C. No. 5:19-CV-00929-R) (W.D. Okla.)

ORDER

Before **BRISCOE**, **KELLY**, and **CARSON**, Circuit Judges.

David Brian Morgan, an Oklahoma prisoner proceeding pro se,[1] moves for authorization to file a second or successive habeas application under 28 U.S.C. § 2254. We deny the motion for authorization.

BACKGROUND

In 2011, Morgan pleaded guilty to charges of rape, molestation, kidnapping, and weapons possession. The district court sentenced him to life in prison. Three years later, he filed his first § 2254 habeas application. The district court dismissed the application as time-barred, and we denied a certificate of appealability. Morgan has continued to challenge his convictions in district court and this court, and we twice have denied him authorization to file a second or successive habeas application.

[1] Because Morgan is pro se, we liberally construe his filings but will not act as his advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

In his current motion, Morgan seeks authorization to file a § 2254 application claiming: (1) the state court lacked jurisdiction because his crimes "occurred within the boundaries of the Indian reservation of the Choctaw and Chickasaw Nations," Mot. at 17, and therefore are subject to exclusive federal jurisdiction under the Major Crimes Act (MCA), 18 U.S.C. § 1153(a); (2) he received ineffective assistance of counsel (IAC) because his attorney failed to raise such jurisdictional objections; and (3) an unidentified state statute provides that his sentence was deemed to have expired once he was transferred to a private prison.

DISCUSSION

Morgan's second or successive habeas application cannot proceed in the district court without first being authorized by this court. *See* 28 U.S.C. § 2244(b)(3). We therefore must determine whether his "application makes a prima facie showing that [it] satisfies the requirements of" subsection (b). *Id.* § 2244(b)(3)(C). In particular, we must dismiss any claim not raised in a prior application unless the claim: (1) "relies on a new rule of constitutional law" that the Supreme Court has "made retroactive to cases on collateral review," *id.* § 2244(b)(2)(A); or (2) relies on facts that could not have been discovered through due diligence and that establish the petitioner's innocence by clear and convincing evidence, *id.* § 2244(b)(2)(B). "If in light of the documents submitted with the application it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition, we shall grant the application." *Case v. Hatch*, 731 F.3d 1015, 1028 (10th Cir. 2013) (internal quotation marks omitted).

Morgan seeks authorization to proceed under § 2244(b)(2)(A) and contends his jurisdictional and IAC claims rely on a new retroactive rule of constitutional law—specifically, the Supreme Court's recent decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), and our decision in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), which the Supreme Court summarily affirmed in *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam), for the reasons stated in *McGirt*.[2] In *Murphy*, we held that Congress had not disestablished the Creek Reservation in Oklahoma and that the state court therefore lacked jurisdiction over the petitioner, a Creek citizen, for a murder he committed on the Creek reservation. 875 F.3d at 904. In *McGirt*, the Supreme Court similarly concluded that the territory in Oklahoma reserved for the Creek Nation since the 19th century remains "'Indian country'" for purposes of exclusive federal jurisdiction over "'certain enumerated offenses'" committed "within 'the Indian country'" by an "'Indian.'" 140 S. Ct. at 2459 (quoting 18 U.S.C. § 1153(a)). Morgan's motion for authorization fails for several reasons.

First, Morgan has not shown his claim actually "relies on" *McGirt*. 28 U.S.C. § 2244(b)(2)(A). Although we do not consider the merits of a proposed second or successive application in applying § 2244(b)(2), *see Ochoa v. Sirmons*, 485 F.3d 538, 541 (10th Cir. 2007) (per curiam), neither is it sufficient to merely provide a citation to a new rule in the abstract. Instead, the movant must make a prima facie showing that the claim

[2] For his conclusory claim that his sentence expired once he was transferred to a private prison, Morgan relies on an unidentified "Oklahoma statute," Mot. at 9, and not a new rule of constitutional law under § 2244(b)(2)(A).

is based on the new rule. *See* 28 U.S.C. § 2244(b)(2)(A), (3)(C). And here, Morgan has not alleged that he is an Indian or that he committed his offenses in the Indian country addressed in *McGirt*, such that the MCA might apply.

Moreover, even if Morgan had adequately alleged reliance on *McGirt*, he has failed to establish that the decision presented a new rule of constitutional law. In *McGirt*, the Court noted that the "appeal rest[ed] on the federal Major Crimes Act" and that application of the statute hinged on whether the Creek Reservation remained "Indian country" under the MCA. *McGirt*, 140 S. Ct. at 2459. Based on decades-old decisions, including *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), and *Solem v. Bartlett*, 465 U.S. 463 (1984), the Court explained that "[t]o determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress." *McGirt*, 140 S. Ct. at 2462. In other words, the Court cited well-established precedent and reviewed Congressional action to determine whether a federal statute applied. That hardly speaks of a "new rule of constitutional law," 28 U.S.C. § 2244(b)(2)(A).

Finally, even if *McGirt* did present a new rule of constitutional law, the Court did not explicitly make its decision retroactive. "[T]he only way [the Supreme Court] could make a rule retroactively applicable is through a holding to that effect." *Cannon v. Mullin*, 297 F.3d 989, 993 (10th Cir. 2002) (internal quotation marks omitted). It is not sufficient that lower courts have found the rule retroactive or that the rule might be retroactive based on "the general parameters of overarching retroactivity principles." *Id.* Because the Supreme Court has not held that *McGirt* is retroactive, Morgan cannot satisfy this requirement for authorization under § 2244(b)(2)(A).

CONCLUSION

Because Morgan has not satisfied the requirements for authorization in § 2244(b)(2), we deny his motion. The denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." *Id.* § 2244(b)(3)(E).

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk